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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-472

BETTIS CORPORATION and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioners,

versus

CHARLES WHEATLEY COMPANY,

Respondent.

BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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TO THE HONORABLES, THE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

For the reasons hereafter set forth, CHARLES WHEATLEY COMPANY, third party defendant-appellee prays that this Honorable Court refuse the writ of certiorari sought by petitioners.

STATEMENT OF THE CASE

These proceedings were instituted by the wife and child of Murray White, an employee of Charles Wheatley Co., (Wheatley) who was killed due to an explosion on a fixed platform in the Gulf of Mexico upon which he was working. In suing Bettis Corporation, the plaintiff alleged that the explosion resulted from a defect in an "actuator" manufactured by Bettis Corporation, which constituted a component part of what is known as a "Wheatley Univalve Launch Package", an apparatus designed to clean moisture from within natural gas transmission lines connecting offshore drilling platforms. This particular launch package, which was assembled by Wheatley, was sold to Texas Eastern Transmission Corporation (Texas Eastern) and was installed on its offshore fixed platform. White's widow and child are presently collecting compensation benefits to which they were and are entitled under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S.C. Sections 901 et seq. (L & H W Act) from appellee herein, Wheatley. They also instituted an action in tort for damages against Texas Eastern and the Bettis Corporation, the latter party having manufactured the allegedly defective actuator valve incorporated in the launch system.

Bettis and its insurer, St. Paul Fire & Marine Insurance Company, filed third-party complaints against Wheatley, seeking indemnity or contribution in tort in the event that they should be held liable to White's survivors on the principal demand. The trial court, however, entered a Rule 54 (B) FRCP Order

granting Wheatley's motion to dismiss the third-party complaint from which dismissal Bettis and its insurer appealed to the United States Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the trial court's dismissal of the third-party complaint, prompting Bettis and its insurer to make application to this Honorable Court for a writ of certiorari.

QUESTION PRESENTED

The only issue presented by this application is whether the third party claims for tort indemnification or contribution brought by appellants should be barred by the exclusive remedy provisions of the L & H W Act.

REASONS FOR REFUSING WRIT OF CERTIORARI

A. The exclusion provisions of Title 33 U.S.C. 905 of the L & H W Act bar third party claims against an employer.

In constructing an argument in opposition to the application for writs of certiorari, the writer begins with the exclusionary provisions of the L & H W Act. Title 33 Section 905 contained (prior to the 1972 amendment) the following pertinent language.

> "The liability of an employer prescribed in Section 904 of this Title *shall be exclusive and in place of all other liability* of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, *and anyone otherwise*

entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . ." (Due to the time at which this death occurred, the 1972 amendments are not applicable to this case. However, this particular provision was not amended or changed by the 1972 Legislation.)

The language "and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death" is without doubt sufficient to cover claims brought by third party tort feasors such as Bettis which arise out of the death or injury of the employee. The immunity provided for in Title 33 U.S.C. Section 905, cannot be limited to actions brought by employees, their legal representatives, relatives, dependents and survivors, etc., without rendering the clause just quoted purposeless. To read the statute so narrowly would impute to Congress an intent to write into it a meaningless provision which would operate as mere surplusage. It is a fundamental principle of statutory construction that all provisions of a statute are presumed to have a purpose and when the language of a statute is clear and unambiguous its provisions should be given effect. It is respectfully submitted that the exclusionary provisions of the L & H W Act construed together clearly mean what their language unambiguously and unequivocally suggests — that an employer is to be wrapped with complete immunity from any and all actions arising out of or in any manner connected with the death of his employee, whether they be instituted by the employee, his

representatives, relatives, survivors, etc., or by third-party claimants seeking indemnification or contribution in tort.

The obvious intent of the L & H W Act is to provide the injured employee (or his survivors in case of death) with a remedy against his employer regardless of where the fault for his injuries lies. In return for giving up the right to resist recovery by its employee for job-related injuries, the employer is vested with immunity from all actions brought by the employee, his survivor, dependents, legal representatives, etc., or by third parties which arise out of or are related to the job injury. See, *Cooper Stevedoring Company v. Fritz Kopke, Inc., et al, 94 S. Ct. 2474 (1974);* see, also, *Nations v. W. W. Morris and American Motorists Insurance Company, 483 F. 2d 577 (1973), cert. den.* To permit complete or partial reimbursement of third party tort feasors at the expense of employers who are also bound to make compensation payments to their injured employees would subvert the exclusiveness of remedy provisions of the L & H W Act. Such an employer would be in the untenable position of having to pay not only the compensation claims of his employee, but the claims for reimbursement by third party tort feasors. The aims of the act designed and implemented to limit the liability of the employer for work-related injuries sustained by his employees to the payment of compensation benefits would be indirectly circumvented by third-party claimants seeking tort indemnification or contribution.

In passing the L & H W Act, Congress recognized the tremendous burden of employers who in the course of their large scale operations are often subjected to

claims for job-related injuries brought by employees. Accordingly, Congress enacted the exclusionary provisions referred to in order to lighten this burden. It is respectfully submitted that to permit recovery on the part of third party plaintiffs herein against the employer would thwart the intent of Congress by allowing circumvention of the exclusionary provisions of the L & H W Act which provisions are grounded on considerations of sound policy.

B. Jurisprudence.

The jurisprudence is well-settled that inasmuch as the L & H W Act immunizes employers from any tort liability in connection with the injuries or deaths of their employees then *ipso facto* employers cannot be held liable to third party claimants on the basis of any negligence on their part which may have contributed to the death of the employee. See, *Loffland Brothers Company v. Roberts, 386 F. 2d 540; Ocean Drilling & Exploration Company v. Berry Brothers Oilfield Service, 377 F. 2d 511 (ODECO).*

In fact the Fifth Circuit in deciding the instant case against third party claimants relied expressly upon the ODECO case. In ODECO, employees of Berry Brothers injured while performing repairs on an off-shore drilling platform owned by ODECO, filed actions in tort against ODECO alleging the latter's failure to furnish a safe place to work as causative of their injuries. At the same time the injured employees received L & H W compensation benefits from Berry Brothers to which they were entitled. ODECO third partied Berry Brothers, the employer of the injured employees. The Fifth Circuit, affirmed the trial court's

dismissal of the third party complaints. The court there said,

> "It is thus apparent that the Act's exclusive liability provision effectively abrogates any independent tort liability of the employer to its employees, thereby eliminating any basis which may have existed for indemnification on a tort theory. Thus while the employer may continue, even in spite of the exclusive liability provision of the act, to remain liable for indemnity on the basis of an express or implied contractual obligation, in the absence of such obligation, as here, there simply exists no underlying tort liability upon which to base a claim for indemnity against the employer." (Citing *United Air Lines, Inc. v. Wiener, 9th Cir., (1964), 355 F. 2d 379, 402-404, cert. den.; Halliburton Company v. Norton Drilling Company, 302 F. 2d 431 at 434; Brown v. American-Hawaiian S. S. Company, 3rd Cir. (1954), 211 F. 2d 1618; American Mutual Liability Insurance Company v. Matthews, 2nd Cir. (1951), 18 F. 2d 322, 323-336). 377 F. 2d at 514-515.*

The Fifth Circuit in the instant case was also impressed with a more recent statement of the foregoing rule announced in ODECO set forth in *Aetna Casualty & Surety Company v. Service Contracting, Inc., 5th Cir. (1973), 490 F. 2d 299.* There the Court said that having paid workmen's compensation to the employee in accordance with the exclusive liability provisions of the L & H W Act, Service Contracting

was not subject to any independent tort liability to its employees. Without this underlying tort liability, Service Contracting could not have been liable for indemnification in the absence of a written contract. (Citing *ODECO*, and *General Electric Company v. Cuban American Nickel Company, 396 F. 2d 89, 5th Cir. (1968)* and *Halliburton supra*.

The breadth of the immunity afforded employers by the exclusionary provisions of the L & H W Act was recently recognized by the Fifth Circuit in *Nations v. W. W. Morris and American Motorists Insurance Company, supra*. In that case the plaintiff alleged that he was entitled to a remedy in tort against his co-employee whose negligence was alleged to have caused him injury while he was working on an oil drilling platform in the Gulf of Mexico. Although the case involved a claim by one employee against another, the court made the following pronouncement which is applicable to the instant case.

> "Sections 905 A [Section 905 A is the same as Section 905 before the 1972 amendments. The exclusive remedy provisions before and after the amendments to the act are the same] and 933 (I) of the L & H completely obliterates the rights of common, civil or maritime law *against employer and fellow employee*. Congress in its unlimited power has determined that the relationship gives rise *only to compensation liabilities*. The nature of the obligation is that there is *no* — the word is no — obligation."
>
> . . .

> "Here there is no gap — not even a tiny one. L & H is complete and self-sufficient. It affords specific rights by imposing specific responsibilities. In return for sometimes *awesome obligations* it extends to the employer and fellow employees an *absolute* civil immunity." (Emphasis added.)

Although it is impossible to prove a negative, namely that no law exists to support any such claim for indemnity upon the employer who is otherwise clothed by the immunity provisions of the L & H W Act, still we do have some additional guides in the jurisprudence of a positive nature in the Fifth Circuit decision of *General Electric Company v. Cuban-American Nickel Company, 396 F. 2d 89 (C.A. 5, 1968)*. In that case, one Salvadore Locicero, an employee of GE, sued the Cuban-American Nickel Company for personal injuries arising out of an industrial accident at the company's metal recovery plant in Port Nickel, Plaquemines Parish, Louisiana. Locicero, at the time of the accident, was working as an electrician for GE and a member of its repair crew. He was dispatched to the switching station at Port Nickel to repair certain equipment GE had warranted. Cuban-American was in possession and control of the plant and, of course, the switching station, and had an electrical engineer and several electricians in its employ. On the day in question the repair party was admitted to the premises at Port Nickel and escorted to the switching station by the Cuban-American employee charged with responsibility for the station. The employee un-

locked the gate to the fence surrounding the station and unlocked the door to the building containing the electrical equipment to be repaired, gave the repair party a diagram of the wiring of the station, and assured the repair party that it could safely work on the equipment because the station had been de-energized. Unfortunately for Mr. Locicero, it was not. He thereupon brought a negligence action against Cuban-American and Cuban-American in turn third-partied GE, the manufacturer of the equipment and the direct employer of Mr. Locicero. Note here that Cuban-American was the vendee of GE with all of the usual warranties of implied fitness of the product flowing from GE to Cuban-American. The Court found that the plaintiff Locicero was not negligent, that Cuban-American was negligent but that its negligence was passive while GE's negligence was active so that accordingly the District Court entered judgment for complete indemnity in favor of the vendee, Cuban-American against the manufacturer and vendor, GE. GE appealed contending that the exclusive remedy provision of the Louisiana Workmen's Compensation Act completely precluded either indemnity in tort or indemnity based on the breach of an implied contractual obligation. In an extensive and lengthy opinion reviewing not only the Louisiana authorities interpreting the immunity provision of the Louisiana Workmen's Compensation Act, but also maritime authorities on the efficacy of the immunity afforded by the L & H W Act to employers offshore (such as *ODECO* and *Loffland Brothers* cases cited *supra*), the Fifth Circuit concluded absolutely and unequivocally that the Lower Court was wrong in granting indemnity in favor of Cuban-American and against GE in

spite of the fact that Cuban-American was GE's vendee for whom GE was performing services under contract at the time Locicero, GE's employee, was injured.

To this point, the writer has relied exclusively on Circuit Court of Appeals decisions to buttress the argument that the application should be denied. It is suggested, however, that there is a line of cases dealing with the availability of the remedy of contribution in non-collision maritime cases decided by this Honorable Court which supports the contentions of appellee herein. These cases imply that the exclusion provisions of the L & H W Act are broad enough to eliminate the third party claims filed herein.

In *Halycon Lines v. Haenn Ship Sealing & Refitting Corporation, 342 U.S. 282, 72 S. Ct. 277 (1952)* a ship repairman employed by Haenn sued Halycon for injuries incurred while he was repairing Halycon's ship, alleging negligence and unseaworthiness. Because the plaintiff was eligible for compensation benefits under the L & H W Act, he had no action against his employer, Haenn. However, Halycon brought a third party action against Haenn, the employer, alleging that it was entitled to contribution, alleging in effect that the employer was along with it a joint tort feasor. As of 1952 the rule allowing contribution among joint tort feasors in collision maritime cases had not been extended to non-collision maritime cases. This Honorable Court, with Justice Black speaking for the majority, refrained from allowing contribution, citing numerous factors. The opinion did indicate that the majority was influenced by

the fact that Congress had "made fault unimportant in determining the employer's responsibility to his employee" and "made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk and by creation of a statutory schedule of compensation." 72 S. Ct. 277 at 280.

In a per curiam opinion rendered in *Atlantic Coast Line Railroad Company v. Erie Lackawanna Railroad Company, 92 S. Ct. 1550 (1972)*, this court held in a non-collision admiralty case that the District Court had properly dismissed a third party tort feasor's claim for contribution against an injured brakeman's employer. In so holding this Honorable Court relied upon its decision in *Halycon*.

In *Cooper Stevedoring Company, Inc. v. Fritz Kopke, Inc., et al, 1974 AMC 537*, this Honorable Court granted writs for the purpose of extinguishing the confusion then existing as to whether there was contribution in non-collision admiralty cases and in doing so made some statements which are particularly applicable to the case sub judice.

In that case, the plaintiff, a longshoreman employed by Mid-Gulf Stevedores, was injured while loading cargo in a vessel owned and operated by Fritz Kopke under a time charter to Alcoa Steamship Company. The ship had been initially loaded with crates of cargo by employees of another Stevedore, Cooper Stevedoring Company, in Mobile, Alabama. The ship sailed to Houston where the plaintiff was injured when loading cargo on top of the crates. The plaintiff sued Kopke

and Alcoa (the vessel) to recover damages for his injuries. The vessel third partied Cooper seeking contribution. The trial court, after finding that the vessel was unseaworthy and that Cooper's employees had negligently stowed the crates, divided the damages between them and in effect granted the vessel's claim for contribution.

Cooper appealed, alleging that the District Court had erred in permitting contribution in a non-collision maritime case. The Fifth Circuit rejected the latter argument holding that the apparent prohibition against contribution in non-collision maritime cases announced in *Halycon* and *Atlantic Coast Line*, applied only where the joint tort feasor against whom contribution is sought is immune from tort liability by statute. The Fifth Circuit cited *Horton & Horton, Inc. v. T/S J. E. Dyer, 428 F. 2d 1131 (5th Cir. 1970), cert. den., 400 U.S. 993, 91 S. Ct. 461, (1971); Watz v. Zapata Offshore Company, 431 F. 2d 100 (5th Cir. 1970);* In Re *Seaboard Shipping, 449 F. 2d 132 (2d Cir. 1971); cert. den., 406 U.S. 949, 92 S. Ct. 2039, (1972))*. The court added,

> "Sessions [the injured employee], in addition to suing the vessel, could have proceeded directly against Cooper Stevedoring [third party defendant] as Cooper was not his employer, and therefore, *not shielded by the limited liability of the Longshoremen's and Harbor Workers' Act." 479 F. 2d 1041 at 1042.*

The obvious inference from this latter statement is that the L & H W Act confers statutory immunity on employers against claims for contribution and indem-

nification (indemnification being "only an extreme form of contribution" as recognized by the admission of counsel for Bettis and its insurer, in his rebuttal brief filed with the Fifth Circuit Court of Appeals, page 1.).

On certiorari this Court affirmed the Fifth Circuit. In permitting contribution against Cooper Stevedoring Company this Court distinguished the *Halycon* and *Atlantic* cases on the ground that they involved third party actions against employers who were immune from direct action by their employees under the L & H W Act. With reference to the *Halycon* case in particular, the court said,

> "The Court [in Halycon] . . . took cognizance of the apparent trade-off in the Act between the employer's limitation of liability and the abrogation, in favor of the employee, of common-law doctrines of contributory negligence and assumption of risk. (Citations omitted) Confronted with the possibility that *any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act* between the interests of carriers, employers, employees and their respective insurers, we refrained from allowing contribution in the circumstances of that case."

> "*These factors underlying our decision in Halycon still have much force.* Indeed, the 1972 amendments to the Harbor Workers' Act re-emphasized Congress' determination that

> as between an employer and its injured employee, the right to compensation under the Act should be the employee's exclusive remedy. But whatever weight these factors were properly accorded in the factual circumstances presented in *Halycon*, they have no application here. Unlike the injured worker in *Halycon*, Sessions was not an employee of Cooper and could have proceeded against the vessel or Cooper or both of them to recover full damages for his injury. Had Sessions done so, either or both of the defendants could have been held responsible for all or part of the damages. Since Sessions could have elected to make Cooper bear its share of the damages caused by its negligence, we see no reason why the Vessel should not be accorded the same right. On the facts of this case, then, *no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tort feasors.*" *94 S. Ct. 2174 at 2178.* (Emphasis added)

Without belaboring the point it is sufficient to conclude that this Honorable Court recognized in *Cooper Stevedoring* that the legislation, the jurisprudence and "countervailing" considerations of sound policy indicate that the exclusive remedy provisions of the L & H W Act clearly immunize employers from all actions in tort stemming from job related injuries, (fatal or non-fatal) sustained by their employees, regardless of whether the actions are instituted directly against the employer by the employee or whether they are pursued indirectly by third party claimants such as

appellants. It is respectfully submitted that a denial of appellants' application for writs of certiorari is dictated.

REBUTTAL

In his petition for a writ of certiorari, counsel for appellants cites what he considers to be "important" reasons for the granting of the writ.

The appellants' argument is by analogy. They compare the "exclusivity provisions" of the L & H W Act to similar almost identical provisions contained in the Federal Employees Compensation Act (5 U.S.C. Sec. 8116 (C) (FECA), while ignoring the disanalogous character of the employment of tax-paying citizens in government service as opposed to the private sector of the economy. Appellants urge that inasmuch as the exclusivity provisions of each act have for all practical purposes the same verbiage and that the purpose of both federal compensation acts is the same — to "give speedy and certain relief to injured workmen or their dependents in the case of death —" that the two respective provisions should be accorded identical constructions or interpretations. Additionally they cite the conflict in authority among the federal circuits with regard to whether the United States Government (the employer under the FECA) can be subjected to third party claims for indemnification despite the existence of the provision of that Act barring direct actions by its employees. Appellants apparently assume that by resolving this conflict among the circuits concerning the breadth of the exclusive remedy provisions of the FECA in favor of recovery by tort

feasors of indemnity or contribution in tort from the federal fisc, this Honorable Court can at the same time work a "reasonable" construction of the exclusivity provisions of the L & H W Act which would allow recovery on the third party demands against appellee.

Thus it is apparently the contention of the appellants that the court should adopt an interpretation similar to that given by some courts to the FECA, which is however, a different statute passed under a different act with different purposes. Although both acts are in essence federal compensation acts, the L & H W Act covers private employers in private industry while the FECA applies solely to the United States Government as employer. Further, it is submitted that the cases principally relied upon by the appellants in interpreting the FECA exclusivity provisions can be readily distinguished.

Specifically, Bettis, the manufacturer and its insurer, rely upon the *Drake* and *Weyerhaeuser* cases (amply briefed and cited in appellants' application for writs), as the principal cases which indicate that actions for indemnification in tort are not barred by the exclusivity provisions of the FECA. However, a close analysis of these two cases will reveal, we submit, that actually there is no conflict between these two decisions interpreting the exclusive remedy provision under the FECA and the decisions already noted interpreting the exclusive remedy provision of the L & H W Act, for, factually, there is no similarity between the indemnitor and indemnitee in those cases with the relationship between Bettis and Wheatley in this case. What distinguishes *Drake* and *Weyerhaeuser* from this case is that there is *no* independent legal relationship between Bettis and Wheatley the breach of which would serve to form an

independent cause of action between the two whereas in both the *Drake* and *Weyerhaeuser* cases there was such an independent relationship. This was noted in the case of Panico v. Whiting Milk Company, et al v. United States, 335 F. Supp. 315 (U.S. D.C., Mass. 1971) which it is submitted represents a correct interpretation and application of the *Drake* and *Weyerhaeuser* cases.

Panico involved an action for injuries received by the driver of one mail truck in an accident in Massachusetts involving two mail trucks and a milk truck owned by the defendant milk company and operated by the defendant driver who in turn filed a third party complaint against the United States as the employer of the driver of the other mail truck for tort indemnity and contribution. The District Court held that the United States, by paying compensation benefits to the original plaintiff, the mail truck driver who was injured by the joint actions of the milk truck driver and the other mail truck driver, was clothed with immunity under 5 U.S.C.A. Section 8116 (C), the exclusive remedy provision of the FECA Act. Hence the third party action against the United States was dismissed. In so holding, the Court stated:

> "There are two grounds for the court's order of dismissal of the third-party action. The first is that allowance of the third-party claim would avoid the exclusiveness of plaintiff Panico's remedy under 7 (b) of the Federal Employees Compensation Act, 5 U.S.C. 8116 (c). This is a question as to which there has been a conflict of authority among the Courts of Appeals for various circuits. See, e.g., *United Air Lines, Inc. v. Wiener*, 9 Cir., 1964, 335 F. 2d 379, 402-

404, and *Wallenius Bremen G. m.b.H. v. United States, 4 Cir., 1969, 409 F. 2d 994, Murray v. United States, 1968, 132 U.S.App. D.C. 91, 405 F. 2d 1361.* There appears to be little dispute that the government is not liable for contribution because payment of compensation benefits to a federal employee extinguishes the government's liability to him; and accordingly the motion to dismiss is allowed without further discussion as to counts 2 and 4. The division of authority relates to the third-party plaintiffs' claims under counts 1 and 3 for indemnity. We believe that the decisions of the Court of Appeals for the Ninth Circuit, in *United Air Lines, Inc. v. Wiener, supra*, and *Wien Alaska Airlines, Inc. v. United States, 9 Cir., 1967, 375 F. 2d 736,* state the better rule.

The Supreme Court decisions on which the third-party plaintiffs rely, *Weyerhaeuser S.S. Co. v. United States, 1963, 372 U.S. 597, 83 S. Ct. 926, 10 L. Ed. 2d 1,* and *Treadwell Const. Co. v. United States, 1963, 372 U.S. 772, 83 S. Ct. 1102, 10 L. Ed. 2d 136,* reversing *Drake v. Treadwell Const. Co., 3rd Cir., 1962, 299 F. 2d 789,* are distinguishable. Both cases involved tort feasors who were related to each other independently of the accident causing personal injuries, in the *Weyerhauser* case by the historic admiralty rule of divided damages and in the *Treadwell* case by the contract between the company and the United States for the manufacture of a steel expansion tank."

The Fifth Circuit has recognized that the distinction made by the Court in *Panico* is a valid one and that its

interpretation of the significance of the *Weyerhaeuser* case is correct. The correctness of the distinction made in *Panico* was recognized in *Empire Seafoods, Inc. v. Anderson, 398 F. 2d 204 (1968)*, a case involving the question of divided damages between a ship owner who struck a bridge and the contractor building the bridge. The contractor pointed to the exclusive remedy provision provided in the Florida Workmen's Compensation Act and the exclusive remedy provision provided for in the L & H W Act, Section 905(a) and took the position that it could not be burdened with a liability for injuries sustained by its employees in addition to the liability imposed upon it by the Compensation Act by using the divided damage rule inasmuch as to do so would be to permit something to be done indirectly which could not be done directly, citing any number of longshoremen and tortfeasor cases where the employer escaped liability to a third party for injuries to an employee by virtue of the exclusive remedy provision where the party claiming either contribution or indemnity in tort did not have the benefit of a divided damages rule. In disposing of this contention the Fifth Circuit Court of Appeals stated that this was a case which required the application of a divided damage rule inasmuch as it was a collision between a vessel and a bridge under construction, citing the *Weyerhaeuser* case. It then stated:

> "The longshoremen and joint tortfeasor cases relied upon by Cleary are not helpful because the legal relationships of the parties in those cases and the relationship in the case sub judice, involving a maritime collision between a vessel and a bridge, are not comparable and cannot be analogized."

By the same token, if longshoremen and joint tortfeasor cases and cases for indemnity in tort cannot be analogized to a maritime collision case in which the divided damages rule is applicable, then logically maritime collision cases are not analogous and comparable to platform accident cases on the outer continental shelf involving the application of Louisiana surrogate law.

It is submitted that such decisions as *United Air Lines, Inc. v. Wiener, 335 F. 2d 379 (9 C.C.A., 1964); Wien Alaska Air Lines, Inc. v. U.S., 375 F. 2d 736 (9 C.C.A., 1967)* and *Newport Airpack, Inc. v. U.S., 419 F. 2d 342 (1 C.C.A., 1969)* represent a true and correct interpretation of the significance of the *Weyerhaeuser* and *Drake* decisions and their significance regarding the exclusive remedy provision in the FECA Act. These cases clearly demonstrate that those few cases so heavily relied upon by Bettis herein resulted from an erroneous interpretation of the meaning of the *Weyerhaeuser* and *Drake* cases, an interpretation at variance with the Fifth Circuit's understanding and interpretation of the effect of the *Weyerhaeuser* and *Drake* cases, as exemplified by its comments on that jurisprudence in the *Empire Seafoods* case just discussed. For example, *United Air Lines, Inc. v. Wiener*, cited *supra*, involved 31 cases arising out of a mid-air collision between a commercial airliner and a United States Air Force jet fighter. The crew of the airliner was found to be negligent as well as the pilot of the jet fighter. The question then became whether the airline was entitled to indemnity from the United States with regard to the deaths of government employees aboard the airliner at the time of the mid-air collision. The District Court denied either contribution or tort in-

demnity because of the exclusive remedy provision of the FECA Act which clothed the United States with immunity from tort liability with respect to these deceased employees or their heirs. The airline appealed the denial of its claim for tort indemnity or contribution against the United States with respect to the nine government employee cases, contending that the *Weyerhaeuser* case demanded a different decision, one which would permit the airline to obtain tort indemnity from the United States in spite of the exclusive remedy provision of the FECA Act. In overruling that contention and affirming the District Court's action, the Court of Appeal, Ninth Circuit, made a penetrating analysis of *Weyerhaeuser* and its effect and compared and contrasted the decisions under the L & H W Act. It stated:

"The Supreme Court in *Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, 83 S. Ct. 926, 20 L.Ed.2d 1 (1963),* held that the express provisions of the statute do not qualify the historic admiralty rule of divided damages in mutual fault collision. The admiralty rule of divided damages is to be distinguished from the rule of indemnity urged upon us by *United* since under admiralty law there arises from a collision involving mutual fault the right to apportionment of all damages resulting therefrom, including personal injuries, cargo damage, and damage to the ships. The divided damage rule is based upon the duty which each shipowner owes the other to navigate safely irrespective of any duty to the person injured. *On the other hand neither contribution nor indemnity may be awarded without the support of liability on the part of the in-*

demnitor to the person injured. The courts have consistently held that in the absence of an express or implied contract of indemnity or in the absence of the indemnitor's liability to the injured party, there can be no recovery for indemnity. Christie v. Powder Power Tool Corp., 124 F. Supp. 693 (D.D.C. 1954); *Terminal R. Ass'n of St. Louis v. United States*, 182 F. 2d 149 (8th Cir. 1950), cert. den. 340, 825, 71 S. Ct. 60, 95 L. Ed. 606; *Slattery v. Marra Bros., supra; Lo Bue v. United States*, 188 F. 2d 800 (2d Cir. 1951); *Drumgoole v. Virginia Electric & Power Co.*, 170 F. Supp. 824 (E.D. Va. 1959).

As pointed out in the Weyerhaeuser opinion 372 U.S. 602, 83 S. Ct. 926, the exclusive liability provision of the Federal Employees' Compensation Act is indistinguishable from Section 5 of the Longshoremen's and Harbor Worker's Act, 33 U.S.C. 905. In construing this statute the courts have held that an employer may be liable for indemnity to another on the basis of an express or implied contract of indemnity but that in the absence of a contractual duty, the exclusive liability provision removed the underlying liability necessary for indemnity. *American Mutual Liability Insurance Co. v. Matthews*, 182 F. 2d 322 (2nd Cir. 1951); *Lo Bue v. United States, supra; Crawford v. Pope & Talbot*, 206 F. 2d 784 (3rd Cir. 1953); *Brown v. American-Hawaiian S.S. Co.*, 211 F. 2d 16 (3rd Cir. 1954). The courts said in *Crawford v. Pope & Talbot, supra*, 206 F. 2d at 792:

"Authority is lacking 'for saying that differences in the degrees of fault (active or

> passive negligence) between two tortfeasors will without more strip one of them, if he is an employer, of the protection of a compensation act; and we are at a loss to see any tenable principle which can support such a result.' *Slattery v. Marra Bros.*, 2 Cir., 1951, 186 F. 2d 134, 139."

Appellants contend on Page 7 of their petition that in *Ryan Stevedoring Company v. Pan-Atlantic S. S. Corporation*, 350 U.S. 124, 76 Supreme Court 232, 1956, "[T]his Court held that were the injuries to the longshore-employee occurred through the fault of the employer, the third party ship owner has a right to receive full reimbursement from the stevedoring employer, regardless of the existence of the "exclusive liability" provision of the L & H W Act." Appellants took several statements from the text of the Ryan opinion, setting them forth in support of their averment that the exclusive remedy provisions of the L & H W Act apply only to the "employee, and those claiming under or through him." They neglected, however, to quote the following statements from the opinion rendered therein. Thus it was also said by this court:

> "The Act [L & H W Act] nowhere expressly excludes or limits a shipowner's right, as a third person, to insure itself against such a liability either by a bond of indemnity, or the contractors own agreement to save the shipowner harmless. Petitioner's agreement in the instant case amounts to the latter, for, as will be shown, it is a contractual undertaking to

> stow the cargo "with reasonable safety" and thus to save the shipowner harmless from petitioners' failure to do so.
>
> "In the face of a formal bond of indemnity this statute clearly does not cut off a shipowner's right to recover from a bonding company the reimbursement that the indemnitor, for good consideration, has expressly contracted to pay. *Such a liability springs from an independent contractual right. It is not an action by or on behalf of the employee and it is not one to recover damages, "on account of" an employee's "injury or death".* It is a simple action to recover under a voluntary and self-sufficient contract, a sum measured by foreseeable damages occasioned to the shipowner by the injury or death of a longshoreman on a ship.
>
> "While the Compensation Act protects a Stevedoring Contractor from actions brought against it by its employees on account of a contractor's tortious conduct causing injury to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the shipowner, to load the cargo properly.
>
> "The shipowner's action here is not founded upon a tort or upon any duty which the Stevedoring Contracting was to its employee. The third party complaint is grounded upon

> the contractors breach of its purely consensual obligation owing to the shipowner to stow the cargo in a reasonably safe manner. Accordingly the shipowner's action for indemnity on that basis is not barred by the Compensation Act."

Thus, it is clear that the basis for the Court's decision in *Ryan* is that there was an independent contractual undertaking running from the contractor to the shipowner, which provided the basis for the shipowner's action by indemnity against the contractor. The implication from this case is that in the absence of such a contractual or consensual undertaking, the shipowner's claim for indemnity against the contractor-employer would have been barred by virtue of the provisions of the L & H W Act. The *Ryan* case, in fact, stands for the proposition that in order for there to be a right of indemnity or contribution in favor of the third parties, there must be an independent contractual right exercised against the employer in such cases. In the instant case, there is no such contractual relationship between Bettis, the manufacturer of the allegedly faulty actuator, and Wheatley, the assembler of the launch system which incorporated the actuator. There is no warranty or contractual undertaking running from Wheatley to Bettis. If anything there is an implied contractual warranty of fitness of the actuator running from Bettis, which manufactured the actuator which was installed in the Wheatley Launch System, in favor of Wheatley, its vendee!

CONCLUSION

As this court recognized just last year in the *Cooper Stevedoring* case, Congress in 1972 re-emphasized its determination to further limit the employer's liability to third parties while at the same time increasing his already substantial burdens and obligations for benefits to his employees under the L & H W Act. It is most respectfully urged and contended that to grant the relief petitioned for herein by Bettis Corporation and its insurer would only serve to thwart the acknowledged policy of the Congress of the United States in this respect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of December, 1975.

TIMOTHY J. McNAMARA